18

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1912. 1913

No. 812. 378.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

SAMUEL E. MOIST.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED NOVEMBER 15, 1912.

(23423)

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1912.

No. 848.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

SAMUEL E. MOIST.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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1 Pleas had at a regular term of the District Court of the United States for the Eastern Division of the Northern District of Illinois, begun and held in the United States court rooms in the city of Chicago, in the division and district aforesaid, on the first Monday of November (it being the fourth day thereof), in the year of our Lord one thousand nine hundred and twelve and of the Independence of the United States of America the 137th year.

Present: The Honorable Kenesaw M. Landis and the Honorable George A. Carpenter, judges of said court, presiding; Luman T. Hoy, United States marshal for said district, and T. C. MacMillan, clerk of said court.

2 THE UNITED STATES OF AMERICA
vs.
SAMUEL E. MOIST. } 1967.

Be it remembered that heretofore, to wit, on the 17th day of May, A. D. 1912, there was filed in the clerk's office of the said court, in the above entitled cause, an indictment, said indictment being in the words and figures following, to wit:

3 In the District Court of the United States of America for the Northern District of Illinois, Eastern Division.

NORTHERN DISTRICT OF ILLINOIS,
Eastern Division, ss:

The grand jurors for the United States of America, impaneled and sworn in the District Court of the United States of America for the Eastern Division of the Northern District of Illinois, at the May, A. D. nineteen hundred and twelve, term thereof, and inquiring for that division and district, upon their oath present that Samuel E. Moist, hereinafter called the defendant, late of the city of Chicago, in the division and district aforesaid, doing business under the names and styles of S. E. Moist Piano Company and Chicago Piano Company, before and at the time of the committing of the offense hereinafter in this indictment mentioned, had devised a scheme and artifice to defraud one Jennie Rosenthal, then resident at Wakefield, in the State of Michigan, and a class of persons then resident within the said United States not capable by reason of their great number and by reason of a want of information on the part of the said grand jurors of being all named in this indictment; that is to say, such persons whom the said defendant intended to induce to purchase pianos from and through him, the said defendant, in the manner and by the means hereinafter in this indictment set forth, which said scheme and artifice to defraud was and is as follows:

He, the said defendant, under the names and styles aforesaid, planned, devised, and intended to insert certain advertisements in various newspapers throughout the United States, each of which advertisements was to contain, among other things, certain imprints

of what is commonly known as and called "a puzzle picture" and other printed matter offering to the public generally certain articles of jewelry and certain other prizes in the nature of, to wit, credit orders on certain pianos, which credit orders were for the sums of, to wit, three hundred fifty dollars for the neatest correct answer to the said puzzle picture, to wit, the sum of three hundred dollars for the next neatest correct answer, and, to wit, the sum of two hundred dollars to fifty certain other persons sending in a correct answer to the said puzzle picture.

And he, the said defendant, planned, devised, and intended, by means of the said several advertisements of the said puzzle picture and the offers of the said amounts of money and the said jewelry, respectively, as aforesaid, to induce the said persons intended to be defrauded to enter into correspondence with him, the said defendant, and to send to him, the said defendant, answers and solutions of the said so-called puzzle picture.

And he, the said defendant, planned, devised, and intended, after receiving such answers and solutions from the said persons intended to be defrauded, to send through the United States mails a certain letter, to wit, a letter of the substance and character of the letter set out on page eight of this indictment, in and by which letter he, the said defendant, planned, devised, and intended to induce the said persons intended to be defrauded, and each of them, to believe that they, the said persons intended to be defrauded, and each of them, had been awarded a certain prize, to wit, a fourteen carat diamond ring, and another prize, to wit, a credit order of, to wit, two hundred dollars, which said credit order of, to wit, two hundred dollars, he, the said defendant, intended to represent to each of the said persons intended to be defrauded to be a credit to be allowed to each of the said persons intended to be defrauded upon the purchase of a certain piano thereafter to be purchased by each of them, the said persons intended to be defrauded, from the said defendant.

And he, the said defendant, also planned, devised, and intended by means of the said letter to induce the said persons intended to be defrauded to believe that each of them would, by reason of the solution and answer to be sent in by each of them, the said persons intended to be defrauded, as aforesaid, obtain from him, the said defendant, a substantial credit of the value of, to wit, two hundred dollars, to be allowed each of them by him, the said defendant, on
5 the purchase price of such piano, thereafter to be purchased by each of them, the said persons intended to be defrauded, from him, the said defendant.

And he, the said defendant, also planned, devised, and intended falsely to represent to each of the said persons intended to be defrauded, that each of them would be entitled to a credit order of, to wit, one hundred fifty dollars in lieu of the said two hundred dollars if each of the said persons intended to be defrauded would decide to select any piano other than the piano hereinabove mentioned, to wit, a piano of a certain make, to the said grand jurors unknown,

which said other piano was to be represented by said defendant to each of said persons intended to be defrauded to be sold by him, the said defendant, to each of the said persons intended to be defrauded at the retail price of, to wit, two hundred and twenty-five dollars; that is to say, at the price of, to wit, seventy-five dollars cash, the balance of the purchase price of which said last mentioned piano was to be represented by the said defendant to said persons intended to be defrauded to be covered by the so-called one hundred and fifty dollar credit order to be awarded as aforesaid, but, on the contrary, as the said grand jurors charge the facts to be, and as said defendant at all of the said times well knew, he, the said defendant, planned, devised, and intended, when each of the said persons intended to be defrauded should, after answering and solving the so-called puzzle picture as aforesaid, make application for a piano under the terms aforesaid, not to sell the said piano of the purchase price of, to wit, two hundred and twenty-five dollars, as aforesaid, to any of the said persons intended to be defrauded, but intended, on the contrary, to endeavor to induce each of the said persons intended to be defrauded to purchase a piano from him, the said defendant, at a much larger purchase price than two hundred and twenty-five dollars, to wit, at a purchase price of, to wit, four hundred and ten dollars, and at other like large prices, the exact amount of which other prices is to the said grand jurors unknown.

6 And he, the said defendant, also planned, devised, and intended that the said credit order of two hundred dollars, so to be represented to be awarded as aforesaid to each of the said persons intended to be defrauded, as he, the said defendant, well knew, would not in fact be a substantial bona fide credit in the sum of two hundred dollars, but on the contrary, he, the said defendant, planned, devised, and intended to allow each of the said persons intended to be defrauded the said credit in the sum of two hundred dollars only as a fictitious credit upon the purchase of a piano thereafter to be purchased by each of the said persons intended to be defrauded from the said defendant; that is to say, he, the said defendant, planned, devised, and intended arbitrarily to advance the price of the piano intended by him, the said defendant, to be sold to each of the said persons intended to be defrauded, in the sum of, to wit, two hundred dollars over and above the actual, usual, and customary retail price thereof; and he, the said defendant, planned, devised, and intended with respect to each of the said prize credit orders to be offered to each of the said persons intended to be defrauded as aforesaid, to advance the retail price respectively of the piano, at which price such piano was to be sold by the defendant to each of the said persons intended to be defrauded, from the actual, usual, and customary retail price thereof, in an amount equal to the amount of the so-called cash prize credit order respectively to be offered to each of the said persons intended to be defrauded, without the knowledge on the part of each of said persons intended to be defrauded that he, the said

defendant, had and would so advance the price of such piano as aforesaid.

And he, the said defendant, by the means aforesaid, planned, devised, and intended falsely to represent to each of the said persons intended to be defrauded that each of them would obtain from the said defendant upon the payment to him, the said defendant, by each of said persons intended to be defrauded, of the difference between the price at which he, the said defendant, intended to sell such
7 piano to each of said persons intended to be defrauded, and said amounts of two hundred dollars and one hundred and fifty dollars as prize credit orders respectively, as the case might be, as aforesaid, a piano of the value of, to wit, the said difference so to be paid to the said defendant by each of the said persons intended to be defrauded as last aforesaid, plus the said two hundred dollars and one hundred and fifty dollars cash prize credit orders respectively as the case might be as aforesaid: whereas in truth and in fact, as the said grand jurors charge the facts to be and as the said defendant at all of said times well knew, he, the said defendant, intended only to deliver to each of the said persons intended to be defrauded, upon the payment by each of the said persons intended to be defrauded, of such difference as aforesaid, a different and other piano of the retail price of, to wit, not to exceed the said difference so to be paid to the defendant by each of the said persons intended to be defrauded as aforesaid, and of little or no value.

And he, the said defendant, planned, devised, and intended, by means of the promises, as he, the said defendant, at all of the said times well knew, to obtain from each of the said persons intended to be defrauded, a large amount of money, the exact amount of which is to the said grand jurors unknown, to wit, such an amount of money in each case as represented the difference between the price at which such piano was to be so sold by the said defendant as aforesaid to each of the said persons intended to be defrauded, and the several amounts of two hundred dollars and of one hundred and fifty dollars respectively as the case might be, as prize credit orders to be allowed to each of the said persons intended to be defrauded, and convert the same money to his, the said defendant's, own use without rendering to the said persons intended to be defrauded, or any of them, any service or thing of value therefor, and thereby to defraud each of the said persons intended to be defrauded of the said amounts of money respectively.

And he, the said defendant, planned, devised, and intended, by means of the premises, also to defraud each of the said persons
8 intended to be defrauded of a large amount of time and labor of the said persons intended to be defrauded to be expended by each of them in and about the solution and answering by each of them of the said so-called puzzle pictures, which said time and labor would be of the value of, to wit, ten dollars.

And he, the said defendant, planned, devised, and intended, by means of the promises, to induce each of the said persons intended to

be defrauded to travel from their respective homes to the said city of Chicago for the purpose of selecting a piano to be purchased by each of them under the terms, and in the manner, and by the means aforesaid, and thereby he, the said defendant, planned, devised, and intended to cause each of the said persons intended to be defrauded wholly to lose a further large amount of time of the value of, to wit, ten dollars.

And he, the said defendant, planned, devised, and intended by means of the promises, to cause each of the said persons intended to be defrauded to expend a large amount of money of the said persons intended to be defrauded as carfare, and to incur other expenses on their behalf in and about traveling to and from Chicago, for the purpose of making a selection of a piano to be purchased by each of them, the said persons intended to be defrauded, from him, the said defendant, in the manner aforesaid, which carfare and other expenses would be of the amount and value of, to wit, one hundred dollars.

And he, the said defendant, intended, by means of the promises, to cause each of the said persons intended to be defrauded wholly to lose in the manner aforesaid each of the said several sums and the time and labor of the said several persons intended to be defrauded of the value hereinabove mentioned, and thereby he, the said defendant, planned, devised, and intended to defraud each of the said persons intended to be defrauded of the said several sums of money and of the said time and labor of each of them of the value aforesaid, without intending to render or cause to be rendered to them and each of them any service or thing of value therefor.

9 And the grand jurors aforesaid, upon their oath aforesaid, do further present that the said Samuel E. Moist, on, to wit, the twelfth day of August, in the year of our Lord nineteen hundred and eleven, so having devised the said scheme and artifice to defraud, for the purpose of executing the same scheme and artifice and for the purpose of attempting so to do, unlawfully, fraudulently, wilfully, and feloniously did place in the post office of the said United States at Chicago aforesaid, and cause to be placed in that post office, to be sent and delivered by the said post office establishment of the said United States to the said Jennie Rosenthal, at Wakefield, in the State of Michigan, a certain letter of the tenor which here follows, to wit:

10 Long Distance Phone Monroe 3880.

CHICAGO PIANO CO.
Not Inc.
PIANOS—ORGANS.
Warerooms and Factory Wholesale Office.
1351 Milwaukee Avenue.

CHICAGO, Aug. 12, '11.

ENCLOSED FIND STICK PIN WITH OUR COMPLIMENTS. YOU MUST CALL AT OUR STORE TO CLAIM THE $200 COUPON PRIZE AND DIAMOND RING. ONE OF THE LARGEST PRIZE ORDERS—$200.00—AWARDED TO YOU. 14KT. DIAMOND RING FREE TO PURCHASERS OF OUR MAKE NEW PIANOS. NEW $225.00 FOR $75.00.

REPORT TO FACTORY HEADQUARTERS MUST BE MADE BY AUG. 16, 1911, SO YOU MUST CALL BEFORE THAT DATE TO CLAIM YOUR PRIZE AND SELECT PIANO.

Mrs. M. J. Rosentaul.

DEAR FRIEND: You have been awarded one of the largest Credit Orders for your answer to our puzzle. This letter is your order to select any New Piano of our make and receipt for $200.00 will be given you on account, and the balance may be paid in monthly payments. After your selection, you will be given one of our 14k Diamond Rings (Ladies' or Gentlemen's), absolutely free.

Should you decide on any of the ten other makes of New Pianos we sell, you will be credited $150.00.

Do not fail to see the beautiful piano we are offering for $225.00 during our special sale which we are now having. Do not write but come to our sales room and see THE GREATEST PIANO BARGAINS EVER OFFERED IN THIS STATE. This piano is sold the world over for $300.00, and all it will cost you with the advance price order is $75.00.

One order only will be accepted from a customer and credit will be allowed to purchaser from this date until Aug. 16, 1911, and not on any order taken before this date.

DO NOT WAIT, for unless you advise us within seven days that you will claim your prize so we will know that you will call by Aug. 16, 1911, your name will be taken from our list and the next person on the list will be notified.

Any piano selected now can be left at our store to be delivered at any future date without extra charge.

To make it equal for all, we will pay any purchaser's railroad fare within 100 miles from Chicago.

Awaiting an early call or the courtesy of a letter from you, we are

Yours, truly,

CHICAGO PIANO COMPANY.
J. W. WERNER, *Mgr.*

P. S.—Open every evening during this sale.

11 which said letter, when so placed in the said post office of the said United States at Chicago aforesaid, and so caused to be placed in that post office as aforesaid, so to be sent and delivered by the said post-office establishment as aforesaid, was then and there enclosed in an envelope which then and there bore uncancelled United States postage and was directed and addressed to the said Jennie Rosenthal at Wakefield in the State of Michigan, the exact amount of postage and the exact direction and address which was then and there on the said envelope being to the said grand jurors unknown; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

JAMES H. WILKERSON,
United States Attorney.

12 (Endorsed:) No. 4961. United States District Court, Northern District of Illinois, Eastern Division. The United States of America vs. Samuel E. Moist. Indictment for violation section 215 of Criminal Code. A true bill. Henry A. Severy, foreman. Filed in open court this 17th day of May, A. D. 1912. T. C. MacMillan, clerk.

13 And afterwards, to wit, on the 31st day of May, A. D. 1912, there was filed in the clerk's office of said court, in the above-entitled cause, a demurrer; same being in the words and figures following to wit:

In the District Court of the United States of America for the Northern District of Illinois, Eastern Division.

NORTHERN DISTRICT OF ILLINOIS,
Eastern Division, ss:

UNITED STATES
vs.
SAMUEL E. MOIST.

Demurrer.

And the said Samuel E. Moist, in his own proper person, now comes into court here and having heard the said indictment read, says that the said indictment and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law, and that he, the said Samuel E. Moist, is not bound in law to answer the same. And this he is ready to verify, wherefore, for want of a sufficient indictment in this behalf, the said Samuel E. Moist prays judgment and that by the said court he may be dismissed and discharged from the said premises in the said indictment specified.

SAMUEL E. MOIST.

ROY D. KEEHN, *Attorney.*

(Endorsed:) Gen. No. 4961. U. S. District Court. United States *vs.* Samuel E. Moist. Demurrer. Filed May 31, 1912. T. C. MacMillan, clerk.

14 MONDAY, *October 14, 1912.*

CARPENTER, J.

And afterwards, to wit, on the 14th day of October, A. D. 1912, the following order was had and entered of record in said cause before the Honorable George A. Carpenter, judge of said court, to wit:

THE UNITED STATES
vs.
SAMUEL E. MOIST. } 4961.

This cause coming on to be heard on the demurrer of the defendant to the indictment filed herein against him, come the parties by their attorneys and the court having heard the arguments of counsel and having considered same and the briefs submitted and being fully advised in the premises:

It is ordered that said demurrer be and the same hereby is sustained.

15 And afterwards, to wit, on the 6th day of November, A. D. 1912, there was filed in the clerk's office of said court, in the above-entitled cause, an assignment of errors, same being in the words and figures following, to wit:

United States of America, Northern District of Illinois, Eastern Division.

IN THE DISTRICT COURT THEREOF,
November term, A. D. 1912, ss:

UNITED STATES
v.
S. E. MOIST. } No. 4961.

Assignment of errors.

And now comes the plaintiff, the United States of America, by its attorney, James H. Wilkerson, attorney for the Northern District of Illinois, and says that there is manifest error on the face of the record in the above entitled cause in this:

1. That the District Court of the United States for the Northern District of Illinois, Eastern Division, erred in sustaining the demurrer to the indictment in the above entitled cause.

2. That the court erred in not overruling the demurrer to the said indictment in that the court failed to find that the said acts mentioned in said indictment are a violation of section 215 of the Criminal Code.

J. H. WILKERSON,
United States Attorney, Attorney for Plaintiff.

(Endorsed:) No. 4961. In the District Court of the United States for the Northern District of Illinois, Eastern Division. United States vs. S. E. Moist. Assignment of errors. Filed Nov. 6, 1912. T. C. MacMillan, clerk.

16 And afterwards, to wit, on the 6th day of November, A. D. 1912, there was filed in the clerk's office of said court, in the above entitled cause, plaintiff's petition for a writ of error; same being in the words and figures following, to wit:

United States of America, Northern District of Illinois, Eastern Division.

IN THE DISTRICT COURT THEREOF,
November Term, A. D. 1912, ss:

UNITED STATES
v.
S. E. MOIST. } No. 4961.

Petition.

To the Honorable George A. Carpenter, Judge of the District Court of the United States for the Northern District of Illinois, Eastern Division.

Your petitioner, the United States of America, by James H. Wilkerson, attorney for the Northern District of Illinois, respectfully

states and shows that on the fourteenth day of October, A. D. nineteen hundred and twelve, at the regular October term, 1912, of said District Court of the United States for the Northern District of Illinois, Eastern Division thereof, a final order was entered in said court sustaining the demurrer of the defendant S. E. Moist against an indictment which the grand jurors of the United States, impaneled and sworn in said District Court of the United States for said division and district, had returned as a true bill against said S. E. Moist for a violation of section 215 of the Criminal Code. Your petitioner further shows that the said order sustaining said demurrer involves the construction of said section 215 of the Criminal Code.

Your petitioner further states that as he is advised the court erred in sustaining said demurrer.

Your petitioner further shows that the act of March 2, 1907, ch. 2564, 34 Statutes at Large, 1264, provides that a writ of
17 error may be taken by and on behalf of the United States from the District or Circuits Courts direct to the Supreme Court of the United States in all criminal cases in the following instances, to wit:

From a decision or judgment quashing, setting aside, or sustaining a demurrer to any indictment or any count thereof where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded.

Wherefore your petitioner prays that a writ of error may be granted in said cause to the Supreme Court of the United States as by law provided, and that your petitioner be allowed said writ of error and that the record in said case be ordered to be certified to the Supreme Court of the United States as by law provided, to the end that the errors complained of, if any such have occurred, may be duly corrected, and full and separate justice done in the premises.

J. H. WILKERSON,
United States Attorney, Attorney for Plaintiff.

(Endorsed:) No. 4961. In the District Court of the United States for the Northern District of Illinois, Eastern Division. United States vs. S. E. Moist. Plaintiff's petition for a writ of error. Filed Nov. 6, 1912. T. C. MacMillan, clerk. James H. Wilkerson, United States attorney.

18 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the judges of the District Court of the United States for the Northern District of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between The United States of America and Samuel E. Moist, a manifest error hath happened to the great damage of the said the United States of America, as by its complaint appears. We being willing that error, if any hath been, should be

duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 5 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the honorable Edward D. White, Chief Justice of the United States, the 8th day of November, in the year of our Lord one thousand nine hundred and twelve.

[SEAL.] T. C. MACMILLAN,
Clerk of the District Court of the United States for the Northern Dist. of Illinois.

Allowed by—
KENESAW M. LANDIS, *Judge.*

19 (Indorsed:) Supreme Court of the United States. The United States of America vs. Samuel E. Moist. Writ of error. Copy deposited for the defendant in error in the clerk's office, U. S. Circuit Court, Northern District of Illinois.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

In obedience to the within writ, I herewith transmit to the Supreme Court of the United States, a true and complete transcript of the record and proceedings in the foregoing entitled cause this 11th day of November, A. D. 1912.

_____,
Clerk of the District Court of the United States for the Northern District of Illinois.

20 UNITED STATES OF AMERICA, *ss:*

To Samuel E. Moist, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the District Court of the United States wherein the United States of America is plaintiff and you are defendant, to show cause, if any there be, why the order rendered against the said plaintiff as in the said writ mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable K. M. Landis this 8th day of November, in the year of our Lord one thousand nine hundred twelve.

[SEAL.] KENESAW M. LANDIS, *Judge.*

21 On this 9th day of November, in the year of our Lord one thousand nine hundred and twelve, personally appeared before

me, the subscriber, ——— ———, and makes oath that he delivered a true copy of the within citation to ——— ———.

Sworn to and subscribed the day of A. D. 19 .

——— ———.

I have served this writ within my district in the following manner, to wit, upon the within named Samuel E. Moist, by delivering a true copy thereof to him personally on the 9th day of November, A. D. 1912, at Chicago, Illinois.

LUMAN T. HOY, *U. S. Marshal*,
By E. C. MARSALES, *Deputy*.

Marshal's fees:

1 service,	2.00
Expenses in lieu of mlg.,	.20
	2.20

(Indorsed:) No. 11102. Supreme Court of the United States. The United States vs. Samuel E. Moist. 14—230. Citation to the Supreme Court of the United States.

22 In the District Court of the United States for the Northern District of Illinois, 9astern Division.

I, T. C. MacMillan, clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record in case No. 4961, wherein the United States is plaintiff and Samuel E. Moist is defendant, prepared in accordance with praecipe filed herein, as same appears from records and files in said cause now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office at Chicago, in said district, this 11th day of November, A. D. 1912.

[SEAL.] T. C. MACMILLAN, *Clerk*.

(Indorsement on cover:) File No. 23423. N. Illinois, D. C. U. S. Term No., 848. The United States, plaintiff in error, vs. Samuel E. Moist. Filed November 15th, 1912. File No., 23423.

O

FILED MAY 6, 1913.
JAMES H. McKENNEY,
Clerk.

No. 378.

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

THE UNITED STATES, PLAINTIFF IN ERROR,

v.

SAMUEL E. MOSES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

MOTION BY THE UNITED STATES TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
SAMUEL E. MOIST. } No. 848.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Attorney General, and, in accordance with the provisions of the Criminal Appeals Act under which this case arises, moves the court to advance it for hearing at an early day convenient to the court during the next term.

The indictment was for a violation of section 215 of the Criminal Code by using the mails to further a scheme or artifice to defraud.

The particular charge in this case was a scheme of allowing as prizes certain alleged substantial credits upon the purchase price of pianos, whereas in fact the said purchase price had arbitrarily been raised above the actual and customary retail price to an amount equal to the said alleged credits.

The court below sustained a demurrer to the indictment without opinion, but apparently on the authority of the Court of Appeals for the Seventh Circuit in *Miller* v. *United States* (147 Fed., 35).

The Courts of Appeals for the Eighth Circuit (*Horn* v. *United States*, 182 Fed., 721; *Brooks* v. *United States*, 146 Fed., 223; *Harris* v. *Rosenberger*, 145 Fed., 449) and for the Second Circuit (*United States* v. *Palmieri*, 169 Fed., 490; *Wilson* v. *United States*, 190 Fed., 427) are the other way and support the indictment.

Due notice of this motion has been served upon opposing counsel.

JAMES C. MCREYNOLDS,
Attorney General.
WINFRED T. DENISON,
Assistant Attorney General.

APRIL 29, 1913.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
SAMUEL E. MOIST. } No. 378.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The case comes up under the criminal appeals act (34 Stat. L., 1246) the trial court having sustained a demurrer interposed on the ground that the indictment was insufficient in law.

No opinion was rendered below.

The indictment charged unlawful use of the mails in furtherance of a scheme to defraud.

The statute to be construed is section 215 of the Criminal Code (35 Stat. L., 1130), formerly section 5480 Revised Statutes., which reads as follows:

> SEC. 215. *Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises,* or to sell, dispose of, loan,

exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, bank note, paper money, or any obligation, or security of the United States, or of any State, Territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious article, or any scheme or artifice to obtain money by or through correspondence, or by what is commonly called the "sawdust swindle," or "counterfeit-money fraud," or by dealing or pretending to deal in what is commonly called "green articles," "green coin," "green goods," "bills," "paper goods," "spurious Treasury notes," "United States goods," "green cigars," or any other names or terms intended to be understood as relating to such counterfeit or spurious articles, shall, for the purpose of executing such scheme or artifice, or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be

> delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both. (35 St. L., 1130.)

The gist of the indictment (Tr., pp. 1–6) is as follows:

The defendant, who was in the piano business, put out advertisements containing so-called "puzzle pictures," with the announcement that he would give for the "neatest correct answer" a "credit order" for $350 on a certain piano, and for the "next neatest correct answer," a credit order for $300; and for 50 other "correct answers," credit orders for $200 each. There were also certain jewelry prizes not material to the point in this case.

His scheme was, when the answers came in, to send out letters, the material portion of which was as follows:

> Mrs. M. J. Rosentaul.
>
> Dear Friend: You have been awarded one of the largest credit orders for your answer to our puzzle. This letter is your order to select any new piano of our make, and receipt for $200 will be given you on account, and the balance may be paid in monthly payments. After your selection, you will be given one of our 14K. diamond rings (ladies' or gentlemen's), absolutely free.
>
> Should you decide on any of the ten other makes of new pianos we sell, you will be credited $150.

> Do not fail to see the beautiful piano we are offering for $225 during our special sale which we are now having. Do not write but come to our salesroom and see the greatest piano bargains ever offered in this State. This piano is sold the world over for $300, and all it will cost you with the advance price order is $75.

But when this Mrs. Rosentaul, for instance, presented herself and tendered her hard-earned "credit order," together with her $75 in cash, and called for the piano "sold the world over for $300," and offered on "special sale" "for $225," she would receive not a $300 piano, so being offered to the ordinary public at $225, but a piano which ordinarily sold for $75—precisely the amount of her cash payment. The so-called prize credit order was a mere fiction, devised to deceive Mrs. Rosentaul into giving the defendant $75 on the understanding that she was to receive a $300 article which, even on "special sale," non-prize winners could get only by paying $225.

Because the indictment did not allege that the pianos to be delivered were worth less than the amounts of cash to be taken from the "prize-winners"[1] the demurrer was sustained.

Of course the Government's contention, and the theory of the indictment, was that the purchasers were entitled to get whatever in fact they were promised—the *consideration* for which they gave their money.

[1] There was an allegation (fol. 7) that they were "of little or no value," but the trial court evidently construed this as not serving the purpose, and here we accept that construction.

ARGUMENT.

The trial judge rendered no opinion, but it is evident from the briefs and arguments before him that he followed *Miller* v. *U. S.* (174 Fed., 35) decided by the Court of Appeals of his Circuit (Seventh). In that case the Marinette Gas Engine Co. wrote to the intended victims that it wanted branch managers (which was false) who were to receive $250 a month and profits, and that it was earning a profit of 20 per cent (which was false), and paying 6 per cent on its stock (which was false), all these misrepresentations being intended to induce the victims to purchase stock at par. The Court of Appeals set aside the convictions on the ground that the arousing of false expectations of employment or of an investment paying 20 per cent did not violate the statute; and it was not charged that the stock itself was not worth the price. They ruled that—

> to be defrauded, the person must be deprived by deceit or artifice of something that he has the right to hold or claim, not in virtue of the deceit or artifice, but as against such deceit and artifice (p. 39).

and, in short, as they fully explain (p. 39), it is no fraud under the statute to promise a man one thing and give him another, unless it is also shown that whatever he does get is of less value than whatever he parts with.

The *Miller* case plainly disregards fundamental principles of commercial fair dealing. A man is entitled not merely to what may ordinarily be sold to

the public at the price he is paying, or to what may be estimated by anybody else in the world (or everybody else in the world) as worth that price, but to whatever he himself offers his money for. Our Mrs. Rosentaul, as the defendant knew, was not willing to give her precious $75 for a piano ordinarily sold at that price. In order to get *her* $75, the defendant had to offer something more—namely a $300 piano. That was the whole reason for his hocus pocus of advertisements, letters, "jewelry," "puzzle pictures," and "credit orders." They were necessary to make her *believe*, guileless soul, that what she saw was really a $300 piano, and that the defendant was going to let *her* (the solver of the puzzle) have it on better terms than anyone else in the world. If she had been willing to give *her* $75 for what everyone else could get for $75, Moist would have needed none of his elaborated artifices.

Commercially and morally it was a deception and a cheat—aimed, as most of these schemes are, at the multitude of gullible persons who are eager to get rich quick, or who can not resist "buying what they don't want, because it's cheap."

The decision, however (to quote the words of *Miller's* counsel), distinguishes "*criminal* fraud from *commercial* fraud," and the question is whether this statute intends to draw any such distinction.

Certainly the language of the statute gives no hint of any such limitations. It is as broad as it can be:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or

> for obtaining money or property by means of false or fraudulent pretenses, representations, or promises. * * *

Durland v. *U. S.* (161 U. S., 306) has always been considered (except by the *Miller* case) to have swept away all these fine-spun technicalities and to have established for this language the broadest construction, covering every kind of moral, commercial cheat. Indeed, the first concern of the court in that case was to point out that—

> So far as the moral element was concerned it must be taken that the defendant's guilt was established (p. 312),

and the court then proceeded to dismiss the defendant's contention that the statute reaches only such cases as at common law would come within the definition of "false pretenses." The defense was that there was no misrepresentation of "an existing fact," but only an intended breach of contract. The court's statement of its conclusion as follows has always been taken as the classic definition of the law under this statute:

> The question thus presented is one of vital importance and underlies both cases. We can not agree with counsel. The statute is broader than is claimed. Its letter shows this: "Any scheme or artifice to defraud." Some schemes may be promoted through mere representations and promises as to the future, yet are none the less schemes and artifices to defraud. * * * (p. 313).

But beyond the letter of the statute is the evil sought to be remedied, which is always significant in determining the meaning. It is common knowledge that *nothing is more alluring than the expectation of receiving large returns on small investments. Eagerness to take the chances of large gains lies at the foundation of all lottery schemes, and, even when the matter of chance is eliminated, any scheme or plan which holds out the prospect of receiving more than is parted with appeals to the cupidity of all.*

In the light of this the statute must be read, and so read it includes everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future. The significant fact is the intent and purpose. The question presented by this indictment to the jury was not, as counsel insist, whether the business scheme suggested in this bond was practicable or not. If the testimony had shown that this Provident company, and the defendant, as its president, had entered in good faith upon that business, believing that out of the moneys received they could by investment or otherwise make enough to justify the promised returns, no conviction could be sustained, no matter how visionary might seem the scheme. The charge is that in putting forth this scheme it was not the intent of the defendant to make an honest effort for its success, but that he resorted to this form and pretence of a bond without a thought that he or the company would ever make good its promises. It was with the

> purpose of protecting the public against all such intentional efforts to despoil, and to prevent the post office from being used to carry them into effect, that this statute was passed; and *it would strip it of value to confine it to such cases as disclose an actual misrepresentation as to some existing fact, and exclude those in which is only the allurement of a specious and glittering promise.* This, which is the principal contention of counsel, must be overruled (pp. 313–314).

It was not claimed in the *Durland* case that the Government had to allege and prove anything but that the bonds were not as represented. The idea that it was essential to prove further that they were not really *equal* in value to the price did not occur to anyone.

The precise contention has, however, been made in other cases and overruled, always on the authority of the *Durland* case.

> *Harris* v. *Rosenberger*, 145 Fed. 449 (C. C. A., 8 C. Van Devanter, J.)
> *Kellogg* v. *U. S.*, 126 Fed., 323. (C. C. A., 2 C.)
> *Wilson* v. *U. S.*, 190 Fed., 427, 433. (C. C. A., 2 C.)
> *U. S.* v. *Palmieri*, 169 Fed., 490. (C. C., S. D. N. Y.)

Harris v. *Rosenberger* was written by Judge (now Mr. Justice) Van Devanter. The misrepresentations were that the whisky advertised was nine years old and was sold cheap because the seller was the distiller

and employed no middlemen. The court below had held (136 Fed. 1001) that the scheme did not violate the statute because the purchaser got a fair equivalent for his money. The Court of Appeals reversed this judgment, following the broad view of the statute laid down in the *Durland* case. Mr. Justice Van Devanter quoted from that case, and reviewed a number of other cases including Mr. Justice Day's opinion, when circuit judge, in *Horman* v. *U. S.* (116 Fed. 350), and summarized his conclusion as follows:

> Our conclusion is that when a business, even if otherwise legitimate, is systematically and designedly conducted upon the plan of inducing its patrons, by means of false representations, to part with their money in the belief that they are purchasing something different from, superior to, and worth more than, what is actually being sold, it becomes an objectionable scheme or device within the intendment of sections 3929 and 4041, although what is being sold may approximate in commercial value the price asked and received. The difference between such a scheme or device and those where nothing whatever or nothing at all equivalent in value is intended to be returned for the money obtained is one of degree only, but not of principle. Both are grounded in deceit, operate injuriously upon the public, and constitute the obtaining of money by means of false pretenses. A purchaser is entitled to receive what he is induced by the vendor's representations to believe

> he is ordering and paying for, and not something which he does not order and may not want at any price.

Kellogg v. *U. S.* involved circulars inviting the recipients to send money for investment, and misrepresenting the status, condition, and prospects of the advertiser and his undertakings. The defendant claimed that the indictment was defective in that it did not charge any intent not to invest the money for the owner's benefit.

The Court of Appeals (second circuit) affirmed the conviction. This case was followed by Judge Chatfield in *U. S.* v. *Palmieri, supra*, rejecting a defense that the stock offered on false representations was still not shown to be worth less than the price charged.

The *Wilson* case involved the wireless telegraph speculation frauds (the prosecution which came to this court on a question of contempt and privilege of witnesses, 221 U. S., 361). The defendants claimed that there was nothing to show that the stock was worth less than the price paid, but the court adhered to its former decision in the *Kellogg* case, and after quoting from the *Durland* case, made the following statement, which is particularly applicable here:

> * * * We are of the opinion that a scheme or artifice is established by proof of false and fraudulent misrepresentations by which a person's right of open and fair dealing is invaded; that having shown that the defendants used false and fraudulent means to

> induce persons to part with their property and to purchase stock which was not of the value represented, the Government was not required to go further and prove either the existence or extent of damage to the purchasers.
>
> Any other construction of the statute would deprive it of all force in dealing with fraudulent schemes in the guise of legitimate corporate enterprises and would place a premium on lies and deceit. It would only be necessary to deal in a stock of uncertain value, e. g., of a corporation owning patent rights, and all the false and fraudulent statements imaginable could be made with impunity and the mails be used to prey upon the public. Purchasers would not obtain that which they were promised; their money would be obtained by false and fraudulent representations, but in how many cases could the Government show that they failed to get their money's worth? How could the real value of such shares be established (p. 434)?

The court expressly rejected the *Miller* case, saying:

> In so far as *Miller* v. *United States* (174 Fed., 35) is in conflict with these views we are unable to follow it (p. 434).

In the same spirit with these cases, though not deciding the precise point, are Judge (now Mr. Justice) Day's opinion in *Horman* v. *U. S.* (C. C. A. 6th C.; 116 Fed. 350) affirming *U. S.* v. *Horman* (118 Fed. 780), the opinion of the Court of Appeals for the Eighth Circuit in *Horn* v. *U. S.* (182 Fed. 721), the

last word of this court on this statute in *U. S.* v. *Stever* (222 U. S. 167), and the decision in *Hale* v. *Haas Henkel* (216 U. S. 462).

Among the numerous State court decisions holding that proof of loss in dollars and cents is not essential to proof of fraud, even at common law, are—

Culver v. *Webb*, 12 Conn. 441.
Murray v. *Jennings*, 42 Conn. 9.
Williams v. *Kerr*, 152 Pa. St. 560.
Pendergast v. *Reed*, 29 Md. 398, 404.

And so even of the crime of obtaining money by false pretenses:

Comm. v. *Judd*, 2 Mass. 329, 335–6.
People v. *Oscar*, 105 Mich. 704.
Comm. v. *Coe*, 115 Mass. 481.

CONCLUSION.

The judgment should be reversed.

WINFRED T. DENISON,
Assistant Attorney General.

SEPTEMBER, 1913.

○

Supreme Court, U. S.
FILED.
OCT 7 1913
JAMES H. McKENNEY,
Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 378

THE UNITED STATES,
Plaintiff in Error,
vs.
SAMUEL E. MOIST.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR SAMUEL E. MOIST, DEFENDANT IN ERROR.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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STATEMENT.

On the question of value the indictment charges that it was the intention of the defendant not to deliver pianos of a value equal to the cash payments plus the amount of the credit orders but to deliver "a different and other piano of the retail price of, to-wit: not to exceed the said difference so to be paid to the defendant by each of said persons intended to be defrauded as aforesaid, and of little or no value." (Tr., p. 4.)

We do not know why the demurrer was sustained; no opinion was rendered and it does not necessarily follow from the record that the indictment was held defective because it was not alleged that the pianos to be delivered were worth less than the cash paid. Our contention is and has been two-fold: First, that as a general proposition there can be no crime under the statute in question without an intention to inflict property loss; and second, that this particular indictment was bad because as a matter of charging value it was duplicitous.

ARGUMENT.

I.

Even if the abstract proposition contended for by the Attorney General is sound the indictment is bad because it is duplicitous. The defect cannot be cured by the assertion of the Attorney General that he will ignore a certain allegation now found in the indictment. The defendant is left entirely without a formal statement of the Government's position on the value question. As now pleaded the charge is that the pianos in question were sold for $75 *and were of little or no value*. This charge is obviously in the alternative and leaves us entirely uncertain as to the kind of case which the Government proposes to make. We are entitled to know whether the Government in the trial of this case intends to stand wholly on the matter of selling price or intends to attempt proof of value. As the indictment now stands the prosecution may do either of these things and its position cannot be controlled by any assertions now contained in the briefs. The indictment as it now stands may be supported by proof that the pianos in question had no value. In like manner it may be supported by proof that the pianos had *little value*. That phrase is a wholly elastic and inappropriate phrase for an indictment. A decision that this indictment is good and that the demurrer should be overruled would constitute a judicial holding that proof of any one of these alternative averments will warrant a conviction. We argued this po-

sition in the court below and think that the court adopted our position as the sound one and paid no especial attention to the abstract question now argued by the Attorney General.

It is a familiar rule that an indictment should specifically inform the defendant of the charge which he will be called upon to meet and that indictments in this alternative form are bad. For cases of this kind see:

State v. *Gary*, 36 N. H., 359.
Commonwelth v. *Grey*, 68 Mass., 501.
People ex rel. Schuler v. *Schatz*, 50 App. Div., 544.
Clifford v. *The State*, 29 Wis., 327.
Robeson v. *The State*, 3 Heisk, 266.

II.

We further submit that to defraud under the statute in question necessarily involves *the infliction of property loss*, and that in the absence of a specific averment that the pianos were worth less than the cash amount paid for them the indictment is bad in substance. That is precisely the case of *Miller* v. *United States*, 174 Fed. Rep., 35. Our position is that this indictment falls clearly within the principle of the Miller case and that the Miller case is decisive.

The Miller case was an indictment under Section 5480 of the Revised Statutes, which has since been incorporated without substantial change in the Penal Code as the section (215) now in question. In that indictment there were three counts. There was a gen-

eral verdict of guilty on all three counts, and a judgment and sentence upon the general verdict. The facts out of which the case arose are stated by the Court of Appeals substantially as follows: A manufacturing company of which Miller was an officer had increased its authorized capital and was desirous of disposing of the additional stock. For this purpose Miller and others gave out that the company desired to open branch sales offices through the United States and was seeking managers for these branch offices; that such managers were to be paid salaries of Two Hundred and Fifty Dollars a month and have shares in the profits, and that the company was earning and paying substantial dividends. It was charged that the purpose of these representations was to effect the sale of fifty shares of stock to each of the persons addressed, and that it was not intended to employ any of them as branch house managers; that various persons did in fact come to Chicago to talk over the matter with the officers of the company and were induced to enter into contracts for the purchase of fifty shares of stock each, at par. The officers of the company never intended that the transactions with these persons should go any further than this; the representations with regard to the intended employment of branch house managers were mere lures by which purchasers were attracted to buy stock.

But in two of the counts of the indictment there was no averment whatever respecting the value of the stock; for ought that appeared in these two counts the stock may have been worth all that the purchasers paid for it. The third alone averred that the stock was not worth the amount paid.

The parallel between the Miller case and the case at bar is very apparent. As is charged in the case at bar, the device involved in the Miller case attracted persons to Chicago from remote distances. As in the case at bar time and money had been expended by persons attracted to investigate and invest. So two of the counts in the Miller case, like the indictment now under consideration as we have analyzed it, omitted to charge that a full equivalent was not given for value received. In the Miller case the stock may have been worth par; in the case at bar the pianos may have been worth the cash paid. The depriving in the Miller case was of a prospective employment which had never existed in fact; the depriving in the case at bar was of an imaginary discount.

The Circuit Court of Appeals reversed the judgment against Miller solely because of a single material error, which, as the court says, governed the prosecution of the case and ran throughout the trial. The Court of Appeals states the position of the Government as follows:

> "That apart from any intention upon the part of the plaintiffs in error actually to deprive the persons named of the money, or other thing of value that such persons might be induced to give up, there would be an offense under Section 5480, provided there were put forth, as a part of the alleged scheme, false and fraudulent pretenses, known at the time to be false and fraudulent, which were intended to deceive the persons to whom they were made, even though such pretenses would result in depriving such persons of nothing that they contributed, apart from the mere expectations excited. In other words, it is contended by the Government, and the con-

tention is supported throughout in the rulings at the trial, that although the scheme alleged in the first two counts was not one through which any one would suffer any actual money loss or injury —be any worse off, except in the matter of disappointed expectations, after than before it— an offense under the section is nevertheless committed, provided the pretenses embodied in the scheme, and the expectations excited thereby, were in fact false pretenses and a false expectation, known by the party making them to be false at the time made."

Of this theory of the case, the Court of Appeals said:

"Because of the application of this view of the section of the statute in question, there runs throughout the whole record errors that make the trial, in all its branches, erroneous."

Judge Grosscup's analysis of the case is extremely penetrating. He says:

"The mere intention of the plaintiffs in error not to meet the expectations of the persons responding to the letters, in the matter of their employment as branch house managers, and of their salary and profits in consequence thereof, and of the earnings of the Company and the dividends therefrom, *do not in the absence of intended loss or injury to such persons in the investment made*, constitute, in our opinion, a crime under Section 5480."

Certain cases were cited on behalf of the Government in an effort to support the contention that the false expectations excited, apart from any actual loss intended, constitute a crime under this section. The court analyzes these cases and proceeds as follows:

"It will thus be seen that in all these cases there is present, as an essential element of the

scheme, the intention to defraud the persons addressed, not out of expectations excited (the expectations were the means used only) but out of the money, or a portion thereof, contributed by them to the scheme. In none of these cases is the mere false pretense or misrepresentation, apart from an actual intended deprivation of the person addressed of the money obtained, held to be an offense under the section in question. In other words, in all these cases *the gist of the offense is the actual or intended injury to the person sought to be reached—the fraudulently depriving him of something he already has*—in none of them is the deprivation of the person addressed of only that which he is led to expect, made the basis of the prosecution.

Suppose that Matson and Foster, the persons named in the first two counts, did not get employment, would they be defrauded, provided they got their outlay back? Defrauded of what —of the expected employment? Apart from what was falsely held out to them, they had no claim on such employment. Defrauded of an investment that would pay twenty per cent.? Apart from what was falsely held out, they had no claim to such an investment. How can they be said to be deprived of anything that has no existence, except in the false promise itself; *and if there was no intention to deprive, there cannot, within the meaning of this section, be an intention to defraud; for to be defrauded, the person must be deprived by deceit or artifice of something that he has the right to hold or claim, not in virtue of the deceit or artifice, but as against such deceit and artifice.*"

Every line of Judge Grosscup's opinion is peculiarly applicable. In the indictment before us now, is there any intended deprivation,—any intended infliction of property loss? Paraphrasing Judge Grosscup's language,—suppose that Mrs. Rosenthal, the

person named in the indictment under consideration, did not get a *bona fide* discount for her credit order, would she be defrauded provided she got her outlay back? Defrauded of what—of an expected discount? Apart from what was falsely held out to her she had no claim to such discount. How can she be said to be deprived of anything that had no existence except in the false promise itself? *If there is no intention to deprive, there cannot be an intention to defraud; for to be defrauded the person must be deprived by deceit or artifice of something that he has the right to hold or claim, not in virtue of the deceit or artifice, but as against such deceit or artifice.*

In the multitude of decisions it would be hard to find a case more applicable; we submit that to the extent so far discussed the indictment falls clearly within the principle of the decision in *Miller* v. *United States.*

The position of the Government is said to be that the Miller case is not good law and that to defeat expectations created may amount to a fraud even though no property loss is inflicted. The authorities do not sustain this position.

In the Durland case, 161 U. S., 306, this court expressly states that "the defendant did not intend * * * that although money was received, any should be returned, but that it should be appropriated to his own use." (p. 312.) The only question in that case was whether deception in the *making of a promise* could constitute a fraud under the statute in question. No distinction whatever is drawn

in that case between a mere returning of the value previously given and a delivery of value in excess of the value received. The case turned entirely upon the quality of a false promise as a criminal deceit. That is not the case at bar.

There is nothing in the Stever case, 222 U. S., 167, that bears upon the present controversy at all. The present question is not in the case in any aspect.

The Haas case, 216 U. S., 456, was an indictment under Section 5440 of the Revised Statutes and separate sections, covering a different group of crimes and while it is there asserted that the United States can be defrauded without the actual infliction of property loss, the idea is clearly apparent that damage must be inflicted, that the Government must be worse off in a tangible, material way. It is nowhere said in this opinion that a mere withholding of expected benefits amounts to a defrauding.

There are some expressions in certain courts of appeals decisions which are opposed to our position, but we submit Judge Grosscup's opinion in the Miller case as by far the more logical and convincing analysis of the law.

The Government's theory appears to be that a fraud is involved because purchasers *do not receive value as represented*. In other words, we understand that the position of the Government is that the test of criminality under this statute is not whether a loss has actualy been sustained, but whether the thing that the purchaser has been induced to buy, has a lower value than he has been led to believe.

Applying this theory to the case under consideration the proposition would be that although it is not sufficiently denied in the indictment that the merchandise sold is not equal in value to the cash consideration paid, the purchasers are nevertheless defrauded *because they are induced erroneously to believe that they get value greatly in excess of the cash consideration paid.*

One answer to this suggestion is contained in Judge Grosscup's opinion in *Miller* v. *The United States.* The only thing which the purchaser of merchandise expects to receive and does not in fact receive, is the greater value. He gets the specific article of merchandise which he selects, and in this there is no deception nor deprivation; and the only thing which he believes he is to receive and does not receive, is the value of the merchandise as he is led to estimate it, and the value of the merchandise as it actually exists. Conceding, therefore, that it may fairly be said that he is deceived as to value, it clearly appears that even with this concession the only thing of which he is deprived is an imaginary value which has no existence except in the false belief. *The purchaser is not deprived of anything that he has a right to hold or claim as against the deceit and artifice, but is denied only the imaginary thing which exists solely by virtue of the deceit and artifice.* The Miller case covers this point with mathematical precision. AN EXPECTATION IS AROUSED OF GETTING SOMETHING FOR NOTHING, AND IT IS NOW CONTENDED THAT TO AROUSE THAT EXPECTATION IS CRIMINAL IF AT THE OUTSET IT IS INTENDED THAT THE EXPECTATION

SHOULD BE DISAPPOINTED. NOTHING IS TAKEN AWAY WHICH HAS EVER ACTUALLY EXISTED. THERE HAS BEEN NO DEPRIVING, NO DEFRAUDING, NO OBTAINING OF PROPERTY. THE IDENTICAL THING WHICH THE PROSECUTOR CLAIMS HE SHOULD HAVE RECEIVED AND DID NOT, IS THE VERY THING WHICH HE ALLEGES TO HAVE HAD NO EXISTENCE IN FACT. The Miller case is a complete answer to this particular suggestion.

But further as to this suggestion, and disregarding the Miller case,—even if the indictment were held to contain a misrepresentation as to value, it is uniformly held that a misrepresentation as to value does not constitute an actionable fraud. When parties are negotiating for the purchase and sale of property, real or personal, each has a right to exalt the value of his own property to the highest point his antagonist's credulity may bear, and depreciate that of the opposing party; and if there is opportunity to examine the property, such boastful assertions or exaggerated descriptions cannot be considered as amounting to fraudulent misrepresentation or deceit.

Miller v. *Craig*, 36 Ill., 109, 111.

Even a false representation with regard to value of a business,—a matter with regard to which the vendor is necessarily much better informed than the prospective purchaser,—has been held not to constitute a false pretense.

Reg. v. *Williamson*, 11 Cox C. C., 3-28.

The following cases are all to the same effect:

Commonwealth v. *Wood*, 142 Mass., 459.

State v. *Paul*, 69 Me., 215.

People v. *Jacobs*, 35 Mich., 36.

But it is conceded that in the indictment now under consideration there is no representation as to *value* which is sufficiently made. The most that can be said of the charge is that a representation is made as to *price;* and even if under peculiar circumstances a representation as to value may sometimes be said to be fraudulent, the same can never be said of a representation as to price. This proposition has been illustrated in the case of *Scott* v. *The People,* 62 Barb., 62.

In that case Scott had been indicted and convicted for obtaining the signature of one Wilson to six promissory notes of $1,000 each, by false pretenses in the purchase by the latter from Scott's co-defendant, Nicholson, of the title to one-half of a certain patent right. The pretense was with regard to the "real and true price" for the whole right. The charge in the indictment was that Scott and Nicholson falsely pretended and represented that the real and true price in money asked and fixed by Nicholson for the right, was $12,000, whereas, in truth, the true price in money asked and fixed for the said right by Nicholson was only $3,000. It appeared that Nicholson, who was the owner of the patent right, and who desired to sell it, had procured Scott to assist him in making the sale, informing Scott that he would sell for $3,000. Scott insisted, however, that Nicholson asked $12,000 or $15,000 so that Scott could also make something out of the transaction. As a result of these arrangements Scott brought Nicholson and Wilson together and a sale was finally made on the basis of $12,000, Scott pretending to buy one-half of the patent right and Wil-

son actually buying the other half and giving in payment for his half the promissory notes in question.

The court identifies as the substantial question in the case, the question whether the charge in the indictment and the evidence as to price were sufficient to establish the crime of false pretenses; and on this question, the court says:

> "That the contrivance between Nicholson and the plaintiff in error by which the trade was effected and the notes obtained from Wilson, was grossly unfair and dishonest in a moral point of view, must, of course, be admitted. But it does not follow from this that the transaction constituted crime of obtaining the signatures to the notes by false pretenses, as charged in the indictment. *Wilson, by the bargain got all he bargained for, and all he expected to get, to wit, the title to one-half of the patent right, and whether it was worth more or less than the price he agreed to pay by his notes, the case does not disclose.* THE CASE, AS IT STANDS UPON THE EVIDENCE, IS NOT THAT WILSON WAS REALLY INJURED AND SUFFERED LOSS BY THE BARGAIN, BUT THAT HE MIGHT HAVE MADE A MORE ADVANTAGEOUS PURCHASE AND GAINED MORE, HAD THE FACTS WITH REGARD TO WHAT NICHOLSON WAS TO RECEIVE, BEEN STATED AND MADE KNOWN TO HIM."

The court then considers the evidence in considerable detail, and proceeds:

> "No matter, so far as this question is concerned, how the price came to be fixed and asked, or pretended at that amount, it was, in fact, asked, and though it may have been asked for the purpose of taking a dishonest advantage of Wilson, the asking was the existing fact. No other price was asked or named or fixed between the parties to the transactions on that occasion than those above referred to.

> The motive in asking this large price is no consequence so far as this offense is concerned. If, in fact, the price was demanded by the seller, it would be a most extraordinary and unheard of thing to convict a merchant of obtaining money or the signature to a note by false pretenses because in selling his goods, by which the money or the note was obtained, he asked the purchaser, and obtained a higher price for the goods than his price mark, or than he had offered to sell the same goods to another customer, or than he would have been willing to take had the purchaser refused to give the pretended price asked and insisted strongly enough on a lower price."

The judgment was accordingly reversed and the discharge of the defendant was ordered.

It will be observed that this Scott case is a harder case in every aspect than the case now under consideration, because in the case under consideration, notwithstanding the higher price asked, the purchaser ultimately gets his merchandise at the figure which the retailer originally seeks, and the asking of the higher price inflicts no injury; whereas in the Scott case the transaction resulted in a payment by the purchaser of the whole amount of the increased price, and he actually paid a sum considerably in excess of the price originally sought by the owner of the patent. The case both in its authority and in its reasoning ought to settle the proposition that a representation as to price can under no circumstances constitute a false pretense.

It can not be successfully contended that these allegations with regard to price are in effect allegations as to value. Price and value are essentially

different. Value is the figure at which property is salable. Value can never be determined solely by the attitude of the seller. It invariably involves also the attitude of the buyer. It is familiarly defined as the amount for which property is sold by an owner who is willing but not compelled to sell, to a purchaser who is willing but not compelled to buy. The minds of both seller and purchaser must meet and coincide.

Price, on the other hand, is a thing wholly within the control of the seller. He may fix a price which is acceptable to the purchaser, or he may fix a price which is prohibitive.

To hold that the naming of a price by a merchant is in effect a representation of value and as such is unlawful when exaggerated, would result in the revolutionizing of the accepted methods of merchandising. It would destroy the historic privilege of the seller to enhance his prices, and the historic privilege of the buyer to depreciate them. The driving of a bargain would be an impossibility. Applying the suggested rule to the familiar methods of everyday business, the business of "two price houses" would be an unlawful business. Every sale made by a merchant or tradesman at a figure higher than by better bargaining he could have been induced to accept, would be subject to rescission for fraud. Advertisements of bargain sales would, in most cases, be subject to exclusion from the mails.

It may be unethical to misrepresent price in connection with a prospective sale. With that we are not concerned. It certainly is an ancient and uni-

versal custom and it could hardly be said that it was the intention of the framers of this statute to cleave so closely to the ethics of merchandising that henceforth a misrepresentation of this kind should be denounced as criminal.

Conclusion.

We accordingly submit:

I. That, the indictment in question is bad because it does not specifically inform the defendant of the charge which he will be called upon to meet.

II. That, the indictment is bad because it does not adequately show an intention to inflict property loss.

Respectfully submitted,

Roy D Keeler

Attorney for S. E. Moist,
Defendant in Error.

Mr. Assistant Attorney General Denison for the United States.

Mr. Roy D. Keehn for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an indictment under § 215 of the Criminal Code of March 4, 1909, c. 321, 35 Stat. 1130, for placing a letter in the post-office for delivery by the post-office establishment for the purpose of executing a scheme to defraud. The scheme alleged was to send out puzzle pictures, advertising as a prize for the neatest correct answer a credit order for $350 on a certain piano, one for $300 for the next neatest, and others for $200 for correct answers. Persons answering were to be told that they were entitled, for instance, to an order for $200 on a piano sold the world over for $300, which would cost them $75 cash with the order. The credit was to be a pretense, as the piano to be delivered was to be one of a retail price not exceeding the cash received. It was not alleged that the piano was to be worth less than the cash paid, but, as is manifest, people were to be led into the dealing by the delusive apparatus of a promise known to be false when made, *Durland* v. *United States*, 161 U. S. 306, and false statements as to the value of the piano bought. The indictment was demurred to and the demurrer was sustained.

It will not be necessary to decide whether the facts alleged show a scheme to defraud, since it does not appear on what ground the court acted. As was said in *United States* v. *Carter*, *ante*, pp. 492, 494: "there is nothing in the record showing any request made to the trial court for an expression of opinion in such form as to manifest clearly whether its action proceeded upon a construction of the statute or merely upon the meaning which was given to the indictment." As it does not appear that the judgment

turned upon any controverted construction of the statute, the writ of error must be dismissed in this case as in that. It is unnecessary to consider whether every determination concerning the common law of fraud taken for granted by the act would be a decision based upon the construction of the statute, within the meaning of the act of March 2, 1907, c. 2564, 34 Stat. 1246.

Writ of error dismissed.

RAINEY *v.* W. R. GRACE & COMPANY.

UNITED STATES *v.* MOIST.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 378. Submitted October 22, 1913.—Decided January 5, 1914.

Where it does not appear that the judgment sustaining a demurrer to the indictment turned upon any controverted construction of the statute, this court has not jurisdiction to review under the Criminal Appeals Act of March 2, 1907.

In this case as it does not appear upon what ground the court below acted in sustaining the demurrer the writ of error is dismissed.

THE facts are stated in the opinion.